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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DUSTIN MICHAEL BURT, Defendant and Appellant.	A140969 (Contra Costa County Super. Ct. No. 51315399)

Dustin Michael Burt appeals from a judgment sentencing him to prison for the three-year middle term after a jury convicted him of a single count of second degree robbery of a teller at a bank. (Pen. Code, §§ 211, 212.5, subd. (c).) During the trial, the prosecution introduced evidence that appellant committed three uncharged bank robberies for the purpose of proving intent, common plan, and identity under Evidence Code section 1101, subdivision (b)[1] (hereafter section 1101(b)). Appellant contends the judgment must be reversed because CALCRIM No. 375, the jury instruction regarding the uncharged bank robberies, understated the burden of proof in a case involving circumstantial evidence by advising the jury this other crimes evidence must be proved only by a preponderance of the evidence. He also contends the instruction violated his right to due process because the jury should not have been allowed to consider the evidence for any purpose. We affirm.

[1] Further undesignated statutory references are to the Evidence Code.

I. TRIAL EVIDENCE

A. Charged Bank Robbery—Chase Bank in Walnut Creek (March 1, 2010)

On March 1, 2010, Brianna Jacobson was working as a teller for Chase Bank in Walnut Creek. The bank branch was less than a mile from the nearest freeway and there were no uniformed security guards working there. Each of the nine teller stations had two drawers containing cash, and the tellers were not separated from the customers by any partition.

Appellant, who had a goatee and silver caps on his teeth, entered the bank wearing a white beanie, jeans and a long-sleeved, untucked striped shirt buttoned all the way up. He was greeted by sales associate Marquis Murphy, and he told Murphy he needed to make a deposit. Murphy, who was standing only one or two feet away from appellant, noticed he had a tattoo on his neck that went up a little past the collar of his shirt.

Jacobson called appellant to her teller station and he walked over and placed a black bag on the counter between them. Appellant leaned in and told her in a serious voice that he was going to rob her. He warned Jacobson to "stop messing around with him" because he had a gun and would use it. He directed her to give him her larger bills and warned her against giving him any "dye packs" or "funny bills." Jacobson gave appellant all of the money in her bottom drawer, which appellant put inside the black bag. He left the bank through the main doors.

The robbery was captured on the bank's video surveillance system. On March 26, 2010 (about three weeks after the robbery) a Walnut Creek Police Department officer went to the bank and showed both Jacobson and Murphy a photographic lineup containing appellant's picture. Both Jacobson and Murphy identified appellant without hesitation as the robber. They also identified him at trial.

B. Uncharged Bank Robbery—Bank of America in Madera (February 27, 2010)

On February 27, 2010, two days before the bank robbery in Walnut Creek that led to the robbery charge in this case, Claudya Martenez was working as a teller at the Bank of America in Madera. The bank branch was "five minutes" from the freeway and no

uniformed security guards worked there. No partitions separated the tellers from the customers.

Martenez saw appellant standing in line, wearing a hat and a white shirt buttoned all the way up. When she called him to her station, she noticed he had something silver covering his teeth. Appellant placed a bank deposit slip on the counter and put his hands on top of the counter and told her, "[D]on't say anything. This is a rob [*sic*]. I don't want to hurt you." He told Martenez to give him $100 bills, and after she complied, told her to give him "twenties." Appellant looked through the bills and found an alarm, which he threw back at Martenez with a "mad" expression. He put the rest of the bills in his pocket and left the bank quickly. The robbery was captured on video by the bank's security surveillance system and Martenez identified appellant as the robber in a photographic lineup conducted a few weeks later. She also identified him at trial as the man who robbed her.

C. Uncharged Bank Robbery—U.S. Bank in Belmont (March 16, 2010)

Neil Park worked as a teller for a U.S. Bank branch in Belmont, which was located less than a mile from the nearest freeway and had no uniformed security guards. No partitions separated the tellers in the bank from the customers.

On March 16, 2010, about two weeks after the robbery charged in this case, appellant approached Lisa Chen, the teller working at the station next to Park's. He was wearing a "do-rag," a black cowboy hat and a partially untucked button-up shirt. After speaking briefly with Chen, appellant moved over to Park's station and Park noticed he had a "5:00 o'clock scruff" around his lips and a "grill" in his mouth. Appellant placed one arm on the counter and said, "This is a robbery." He told Park not to give him any "dummy money" and warned him not to "do anything stupid or else things [would] get tragic." Park gave appellant the money from his drawer, and appellant hopped over a bench in the waiting area and ran through the door.

The robbery was captured on the bank's video surveillance system and Park identified appellant as the robber in a photo lineup. He did not identify appellant at trial,

stating he was not certain whether the person who robbed him was present in the courtroom.

D. Uncharged Bank Robbery—Metro One Credit Union in Concord (February 24, 2011)

Nicole Pittman worked as a teller for the Metro One Credit Union in Concord, which was located less than half a mile from the freeway and had no uniformed security guards. No partitions separated the tellers from the customers.

On February 24, 2011, appellant entered the credit union and Pittman noticed him right away because she knew all the credit union members and appellant was an "unfamiliar face." He was wearing a long-sleeved shirt, a black leather jacket and a turban under which he had tucked his long hair. He was also wearing purple contact lenses. Appellant approached Pittman and told her in a low voice, "Hello, this is a robbery." He told her he "didn't want to get violent" but had "something with him if he needed to." Pittman retrieved cash from a drawer behind her and handed it to appellant along with a dye pack. Appellant threw the dye pack back at her and said he "wasn't stupid" and "not to play with him." Pittman gave appellant all the cash from her drawer and appellant put it in his jacket and told her, "I know you have more. I know that you have more. Give me more." When Pittman said she did not, appellant stepped over to a neighboring station and told the other teller, "This is a robbery. You need to give me all the money that you have." The other teller retrieved the cash and gave it to appellant, who put it in his jacket pocket and ran out the door. When Pittman was shown a photo lineup a couple of weeks later, she identified appellant's photograph as the robber "right away." She also identified appellant at trial as the robber.

E. Arrest and Investigation

Appellant was arrested in Stockton on March 26, 2010, nearly a month after the robbery charged in this case. A Stockton Police Department officer who had been assigned to trail a particular black Mercedes followed the car to a Ross Dress for Less store and saw appellant get out of the car with his girlfriend Gretchen Houston and a man

named LaCharles Baldon. When appellant returned to the car, he was carrying a Ross bag. He sat inside the Mercedes and then got out again and put on a long-sleeved white, button-up shirt that appeared to be new. The group was detained and Houston was questioned in the Stockton police station.

Houston told the officers she and appellant had been dating for about five months, during which time she scoped out banks at appellant's request. She had inspected five banks, three of which appellant later robbed. At appellant's direction, Houston would check to see whether the banks had security guards and whether partitions separated the tellers from the customers. She would also check to see how many people were inside the bank. Twice, Houston went along with appellant on a bank robbery, one of which had been three weeks earlier at a Chase bank. She recalled that during the robbery of the Chase bank, appellant had worn a white hat and a vertically striped shirt, and she identified appellant as the man in a still photo taken from the video surveillance system of the Walnut Creek Chase Bank on March 1, 2010. Houston told the officers appellant had carried a little black bag with a zipper during one robbery and for two others wore a black suede cowboy hat. Six bank deposit slips were found in Houston's purse, and on the back of one was written "Wells Fargo not good."[2]

F. Defense Evidence

Appellant testified and denied committing the charged robbery of the Chase Bank in Walnut Creek on March 1, 2010. He admitted robbing the Metro One Credit Union in Concord on February 24, 2011, and had pleaded guilty to a robbery charge for that offense. He denied committing the two other uncharged robberies of the Bank of America in Madera on February 27, 2010, and the U.S. Bank in Belmont on March 16, 2010. Appellant claimed to have been released from jail in late February 2010, after which he went to Reno, Nevada, for a little over a month. He returned to California on

[2] Houston was called as a prosecution witness at trial and denied having ever accompanied appellant on a robbery or having scoped out banks for him.

March 25, 2010, the day before his arrest. Appellant denied instructing Houston to scope out banks for him and said he had never worn a silver or gold tooth.

Corinne Alfandari, the teller working next to Jacobson in the Chase Bank in Walnut Creek when it was robbed on March 1, 2010, could not identify appellant from a photographic lineup, even though she had given a description of the robber to police.

Fingerprints lifted from Jacobson's counter after the robbery did not match appellant's, nor did any other fingerprints taken from the bank.

Lisa Chen, who had been working next to Park in the U.S. Bank in Belmont when it was robbed on March 16, 2010, and who was initially approached by the robber, could not identify appellant from a photographic lineup. Marina Alexander, who worked at a desk 22 feet way, saw the robbery but identified someone other than appellant when shown the photographic lineup. The branch manager, Najma Khan, was present and gave police a description of the robber, but could not identify anyone in a photographic lineup.

II. DISCUSSION

The trial court allowed the prosecution to present evidence of three uncharged bank robberies under section 1101(b) for the purpose of proving intent, common plan, and identity. At defense counsel's request, the court instructed the jury with CALCRIM No. 375, which described the purposes for which the uncharged bank robberies were admitted and the standard by which those crimes must be proved before they could be considered.

Appellant does not directly dispute the admissibility of the other crimes evidence at the time it was presented, but raises two issues regarding CALCRIM No. 375. First, he contends the instruction understated the burden of proof beyond a reasonable doubt on the ultimate issue of his identity as the perpetrator. Second, he argues the uncharged bank robberies were not sufficiently similar to the charged crime to be admissible on the issue of identity, the only disputed issue in the case, and that rather than giving CALCRIM No. 375, the jury should have been instructed to disregard the evidence of the other bank robberies. We reject both claims.

A. Section 1101(b) and CALCRIM No. 375—General Principles

Section 1101, subdivision (a) "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).) Section 1101(b) clarifies that this rule "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition," including intent, the existence of a common plan or identity. (*Ibid.*)

"When the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense with evidence he had committed uncharged offenses, the admissibility of evidence of the uncharged offenses turns on proof that the charged and uncharged offenses share sufficient distinctive common features to raise an inference of identity. A lesser degree of similarity is required to establish the existence of a common plan or scheme and still less similarity is required to establish intent. [Citations, including *Ewoldt*, *supra*, 7 Cal.4th 380, 402-403.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.) Ultimately, " '[t]he admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence,' " including whether the evidence is more prejudicial than probative and thus subject to exclusion under section 352. (*Id.* at p. 22; see *People v. Edwards* (2013) 57 Cal.4th 658, 711.) Evidence of an uncharged offense to prove a fact such as intent, common plan or identity may be introduced once its proponent establishes, by a preponderance of the evidence, both the fact of the uncharged offense and the defendant's connection to it. (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1115.)

In this case, the legal principles relevant to the evidence of the three uncharged bank robberies were contained in CALCRIM No. 375, which provided as follows: "The People presented evidence that the defendant committed other offenses of bank robbery that were not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the

uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard the evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant was the person who committed the offense alleged in this case; or [¶] The defendant acted with the intent to permanently deprive the Bank of the property in this case; or [¶] The defendant had a plan or scheme to commit the offense alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offense. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Second Degree Robbery as charged in this case. [¶] The People must still prove the charge in this case beyond a reasonable doubt."

B. Preponderance of the Evidence Standard

CALCRIM No. 375 advised the jury that an uncharged offense must be proved by a preponderance of the evidence before it may be considered on the issues of intent, common plan or identity. Appellant acknowledges that this instruction "accurately sets forth the burden of proof" for uncharged offenses, but argues it was misleading because it allowed the prosecution to establish identity under a reduced burden of proof and allowed the jury to override the directive in CALCRIM No. 224 to accept a reasonable conclusion that points to innocence when the evidence supports two or more reasonable conclusions

from circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt.[3] We are not persuaded.

The Supreme Court rejected essentially the same argument in *People v. Virgil* (2011) 51 Cal.4th 1210, 1259-1260 (*Virgil*), in which the defendant challenged the trial court's decision to give CALJIC Nos. 2.50, 2.50.1 and 2.50.2, which, like CALCRIM No. 375, explain the appropriate use of other crimes evidence and the standard of proof by a preponderance of the evidence. The defendant in *Virgil* argued that these instructions failed to convey the need to find those uncharged crimes beyond a reasonable doubt before they could be used as an inference in establishing the defendant's identity as the perpetrator of the charged crimes, and conflicted with CALJIC No. 2.01, which, like CALCRIM No. 224, required proof beyond a reasonable doubt of each essential fact in the chain of circumstances necessary to establish guilt. (*Id*. at p. 1259.)

The Supreme Court found no conflict between the standard of proof by a preponderance necessary to prove an uncharged offense and the standard of proof beyond a reasonable doubt applicable to the links in the circumstantial evidence chain: "We have explained before, however, that these different standards of proof are reconciled by the different purposes for which the evidence is used. When evidence of uncharged misconduct is admitted for the purpose of establishing identity or intent, we have explained that the crimes are mere 'evidentiary facts.' [Citation.] The jury cannot consider them at all unless they find them proven by a preponderance of the evidence. 'If the jury finds by a preponderance of the evidence that defendant committed the other

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[3] CALCRIM No. 224 provided: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering the circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

crimes, the evidence is clearly relevant and may therefore be considered. [Citations.] If the jury finds the facts sufficiently proven for consideration, it must still decide whether the facts are sufficient, taken with all the other evidence, to prove the defendant's guilt beyond a reasonable doubt. [Citations.]" (*Virgil, supra*, 51 Cal.4th at pp. 1259-1260; see *People v. Foster* (2010) 50 Cal.4th 1301, 1347-1348 (*Foster*); *People v. Medina* (1995) 11 Cal.4th 694, 764 (*Medina*) [no danger jury would use preponderance standard to decide elemental facts or issues because instructions on the People's burden and on circumstantial evidence make clear that ultimate facts must be proved beyond a reasonable doubt]; *People v. Davis* (2009) 46 Cal.4th 539, 615-616 [declining to reconsider claims that CALJIC Nos. 2.50, 2.50.1 and 2.50.2 understated burden of proof].)

C. Failure to Instruct Jurors to Disregard Evidence of Uncharged Robberies

Appellant argues that giving CALCRIM No. 375 violated his right to due process and amounted to prejudicial error because the only issue that was actually disputed in this case was the robber's identity and the uncharged bank robberies were not sufficiently similar to be admissible on this issue. Appellant does not allege the trial court erred in granting the prosecution's in limine request to present evidence of the uncharged robberies, but suggests the trial court should have declined CALCRIM No. 375 regarding the use of that evidence and instead instructed the jury to disregard the prior bank robberies entirely.

Appellant's decision to frame this issue as one of instructional error necessarily leads to the rejection of his argument, because appellant requested CALCRIM No. 375. "The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction." (*People v. Lucero* (2000) 23 Cal.4th 692, 723.) CALCRIM No. 375 is a standard limiting instruction that advised the jury it could not consider the uncharged offenses (whose admissibility appellant does not dispute) to prove bad character or disposition to commit a crime. We can readily infer defense counsel had a

rational tactical purpose in requesting this instruction. (*Medina, supra,* 11 Cal.4th at p. 764 [defense counsel invited any error in requesting CALJIC No. 2.50.1, which advised the jury that uncharged crimes must be proved by a preponderance of the evidence].)

Even if we assume appellant's argument is cognizable as instructional error affecting appellant's substantial rights (Pen. Code, § 1259), we find no error, much less reversible error, in the court's decision to give CALCRIM No. 375 rather than a sua sponte instruction to disregard the evidence of the uncharged bank robberies. Appellant's argument is premised on the notion that the evidence of the uncharged bank robberies, though not objectionable when admitted, did not show those robberies to be sufficiently similar to the charged crime to show identity, and were not sufficiently probative on the issues of intent or common plan. These claims, if not forfeited by appellant's failure to make a motion to strike the evidence (§ 353), lack merit.

We first address the issue of identity, which was, as the prosecutor conceded at trial, the primary issue in this case. When considering the admissibility of uncharged crimes for one of the purposes listed in section 1101(b), identity requires the greatest degree of similarity. For uncharged conduct to be relevant to prove identity, the common marks between the charged and uncharged offenses, considered singly or in combination, must " ' "logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety." ' " (*People v. Felix* (1993) 14 Cal.App.4th 997, 1005.) "[T]he uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' " (*Ewoldt, supra,* 7 Cal.4th at p. 403.)

The trial court did not abuse its discretion in admitting evidence of the uncharged bank robberies on the issue of identity because those robberies (one of which was admitted by appellant) bore a number of distinctive characteristics. (See *Medina, supra,*

11 Cal.4th at pp. 748-749.)[4] Each robbery occurred at a bank located near a freeway in which the teller stations did not have a partition or a uniformed security guard. The robber wore clothing designed to conceal his appearance without drawing undue attention to himself when he entered the bank: head coverings or hats, buttoned-up shirts that would conceal identifying characteristics, a metal grill on his teeth, contact lenses. In each instance, the robber quietly approached the teller, gave verbal instructions regarding the money he wanted, and indicated he was familiar with bank security measures such as explosives and dye. He did not brandish a weapon, but suggested he would employ violence if the teller did not cooperate. All but one of the robberies were committed within a several-week period. The surveillance videos from the banks that were robbed strongly suggested the robberies were committed by the same individual, as his appearance was similar in each video despite the clothing and accessories used to conceal his identity. Each teller who was robbed identified appellant as the robber in a photographic lineup and/or while testifying in court.

From this evidence, the trial court could reasonably conclude the uncharged bank robberies were relevant to appellant's identity as the bank robber in the charged offense. (*Medina*, *supra*, 11 Cal.4th at pp. 748-749; *People v. Maury* (2003) 30 Cal.4th 342, 397 & fn. 11, 398, disapproved on other grounds in *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901 [evidence of similarities among victims of crimes was probative of defendant's identity as perpetrator]; *People v. Champion* (1995) 9 Cal.4th 879, 927, overruled on another ground as stated in *People v. Combs* (2004) 34 Cal.4th 821, 860 [defendant's participation in similar robbery and murder after charged offense was probative of defendant's identity as perpetrator]; *People v. Savala* (1981) 116 Cal.App.3d 41, 51 [robberies of similar restaurants on four consecutive nights in which robber "entered, approached the cashier, opened his shirt or jacket to reveal a pistol, demanded

[4] Although appellant has framed his challenge to the use of the uncharged robberies as instructional error, we apply an abuse of discretion standard in analyzing the threshold issue of whether the evidence was properly admitted for a particular purpose under section 1101(b). (*Medina*, *supra*, 11 Cal.4th at pp. 748-749.)

money, and left upon receiving money" were "remarkably similar" and admissible to prove identity].) And, because the crimes were sufficiently similar to be admitted on the issue of identity, it follows that they were similar enough to be admitted to show intent and common plan, which require a lesser degree of similarity. (*Ewoldt, supra*, 7 Cal.4th 380, 402-403.)

Appellant argues that CALCRIM No. 375 should not have been given on the issue of intent regardless of the similarity of the uncharged robberies, because the intent of whoever robbed the bank was not reasonably subject to dispute, even if it was technically at issue. Although we agree this is an appropriate consideration in determining whether evidence of an uncharged crime should be admitted over a section 352 objection to the effect that evidence of an uncharged crime is more prejudicial than probative (see *People v. Balcolm* (1994) 7 Cal.4th 414, 423; *People v. Lopez* (2011) 198 Cal.App.4th 698, 715), appellant is not arguing that the evidence should have been excluded under section 352 and has not preserved such a claim on appeal.

Appellant also argues the use of the uncharged bank robberies to prove a common design or plan was "solely a guise to obtain the benefits of a lower degree of similarity to use the evidence to argue [appellant] was the perpetrator: a matter of identity." We are not persuaded. " 'The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done,' " and bank robberies bearing distinctive common marks may be admissible to establish a common plan or scheme to commit such robberies. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 558-559.)

Even if we assume no instruction on intent or common plan should have been given, the error is harmless because the jury would have heard the evidence of the other bank robberies on the issue of identity. (See *Foster*, *supra*, 50 Cal.4th at p. 1333 [when evidence admissible on one issue under § 1101(b), it was harmless error to instruct on other § 1101(b) issue on which it was not admissible].) It is not reasonably probable the jury in this case would have reached a result more favorable to appellant if CALCRIM

No. 375 had been limited to the issue of identity. (*Ibid*., citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

(A140969)